

United States  
**COURT OF APPEALS**  
for the Ninth Circuit

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NELSON EQUIPMENT COMPANY, a corporation,

*Appellant,*

vs.

UNITED STATES RUBBER COMPANY, a corporation,

*Appellee.*

**APPELLANT'S BRIEF**

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*Appeal from the United States District Court for the District of Oregon.*

FILED

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**JURISDICTION**

This appeal is from a final decision of the District Court of the United States for the District of Oregon, entered on the 29th day of November, 1954, (Tr. 30) and notice of appeal filed on the 27th day of December, 1954, (Tr. 31) and appellate jurisdiction is based on section 1291, Title 28, United States Code Annotated, and Rule 73, Federal Rules of Civil Procedure. The

final decision from which this appeal is taken was entered in a civil action between a corporation organized under the laws of the State of New Jersey, and a corporation organized under the laws of the State of Oregon, for the recovery of a sum of money in excess of \$3,000.00, exclusive of interest and costs (Tr. 3) and jurisdiction of the District Court is based on section 1332, Title 28, United States Code Annotated.

## STATEMENT

United States Rubber Company, the appellee, is a manufacturer of fire hose at Passaic, New Jersey, under the trade name of "Eureka" hose. Nelson Equipment Company, the appellant, was the authorized distributor of Eureka hose in the states of Oregon, Washington, Idaho and the Territory of Alaska (Tr. 7). Appellant would notify appellee of advertisements for bids on fire hose and obtain from appellee an invoice price and, in the event appellant's bid was accepted, would pay appellee the invoice price and bill the customer for the bid price (Tr. 8). In January, 1952, appellant notified appellee of a call for bids by the City of Seattle, Washington, for two lots of fire hose—one for  $3\frac{1}{2}$  inch hose, which is not involved in this case, and one for 4800 feet of  $2\frac{1}{2}$  inch hose. Appellant was the successful bidder for both lots. The order for the  $2\frac{1}{2}$  inch was for 4800 feet of Eureka hose to be delivered to the fire department at Seattle, Washington, each section to bear the label of the Underwriters' Laboratories, Inc. (Tr.

10). The hose was delivered at Seattle on April 8, 1952, and on April 17, 1952, appellant paid appellee the invoice price of \$5,618.88 (Tr. 11).

The hose was delivered in 96 sections and was inspected by members of the fire department and was apparently free from defects. On April 29 and 30, it was distributed to two different engine companies in lots of 48 sections each. On May 10, 1952, it was found that there were breaks in the fabric of the outer jackets of 37 sections delivered to one engine company (Tr. 12-13). This hose had never been put in use or handled except to stencil, drain and hang in the drying tower (Tr. 15). These sections were rejected and on May 28, 1952, appellant notified appellee of the defects and asked for instructions and was instructed by appellee to submit the hose to the Underwriters' Laboratories for a report. Several sections were sent to the Underwriters but a report was not received from the Underwriters until October 27, 1952.

In the meantime, on September 4, 1952, a representative of the fire department, a representative of the Underwriters' Laboratories and the manager of appellant's Seattle plant inspected the rejected 37 sections and made various tests to try to determine what was wrong with the hose but were unable to find the cause of the defects (Tr. 13). As a result of this inspection, the fire department decided to inspect the entire lot and found 22 additional sections with holes in the outer jackets (Tr. 14-15) and then rejected the entire lot. The remaining hose was kept in service by the fire depart-

ment at the request of the manager of appellant's Seattle plant until January 23, 1953, until appellant could get word from appellee, but appellant was finally told by the fire department that the hose was needed and that the entire lot would have to be replaced (Tr. 19).

On November 7, 1952, appellant forwarded to appellee the Underwriters' report of October 27, 1952, and notified appellee that the city had rejected the entire lot and asked for instructions but received no reply. Between that date and January 6, 1953, appellant repeatedly requested a reply to the letter of November 7, without result (Tr. 16-17). On December 18, 1952, appellant demanded that appellee either replace the hose or refund the purchase price (Tr. 17-18). On January 6, 1953, appellant notified appellee that the hose was being held awaiting appellee's order and on January 16, appellee was notified that the hose was being returned, collect (Tr. 17). The hose was received and retained by appellee and appellant was never notified as to the disposition made of it (Tr. 18) and appellee retained the hose and the purchase price.

Appellant was indebted to appellee in the sum of \$3,387.96 on other items and appellee filed action to collect the same, which indebtedness appellant admitted but counterclaimed for the sum of \$5,618.88, the amount it had paid for the rejected hose. The trial court rejected appellant's counterclaim and gave appellee judgment for the amount of its demand from which judgment this appeal is prosecuted.

The trial court found as a matter of fact that appellant relied on the inspection of the Underwriters' Laboratories, Inc., as to the fitness of the hose; that the hose was free from defects when received by the city and that the appellee accepted a return of the hose and retained the same for inspection only (Tr. 27-28) and upon these findings concluded that there was no implied warranty as to the fitness of the hose and that there was no rescission of the contract of purchase (Tr. 29).

## I.

### **THE TRIAL COURT ERRED IN HOLDING THAT THERE WAS NO IMPLIED WARRANTY**

#### **POINTS AND AUTHORITIES**

Where the buyer, expressly or by implication, makes known to the seller that particular purpose for which goods are required, and it appears that the buyer relies upon the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose.

Sec. 75.150 (1) Oregon Revised Statutes.

If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or have reached the place agreed upon.

Sec. 75.190 (5) Oregon Revised Statutes.

Implied warranties are not defeated by an inspection by the buyer unless the defects are such as should have been revealed by the inspection.

Barrett Co. v. Panther Rubber Mfg. Co., 24 F. 2d 329.

Willig v. Brethauer (Cal.), 274 P. 2d 202.

The buyer is not bound by an inspection by a third party unless such party was acting as agent of the buyer.

Smith v. Great Atlantic & Pacific Tea Co., 170 F. 2d 474.

## ARGUMENT

The basis of the trial court's conclusion that there was no implied warranty is set forth in the court's decision:

"Inasmuch as the Invitation to Bid, defendant's bid and Seattle's acceptance thereof were all expressly predicated on the specification of hose labeled by Underwriters' Laboratories, Inc., which labeling, as was well known and understood by all parties could only be procured through the inspection and tests provided for in the Underwriters' brochure entitled 'Standard for Cotton Rubber-Lined Fire Hose,' I am of the opinion that in the absence of fraud such labeling following such testing as to the quality of the hose was conclusive on all concerned. Accordingly there was no implied warranty involved in the sale as a matter of law. Defendant refers to no authorities contrary to the cases to such effect cited in plaintiff's memoranda and in the 46 ALR 864 annotation." (Tr. 23-24)

It is obvious that a buyer is not bound to accept merchandise regardless of its condition at the time of

delivery and the passing of title simply because that merchandise was in first class condition at some time in the past. In many sales merchandise is accepted upon the inspection of a third party but only in those instances where the one making the inspection is acting as the agent of the buyer or both the buyer and seller. The cases referred to by the trial court relate to those instances where there is a delivery and acceptance, either actual or constructive, at the point of origin and not at the point of destination. If the trial court's conclusion be correct, the Underwriters' Laboratories were acting as the agent of the City of Seattle in accepting the hose. There is no evidence to support this conclusion. The only evidence is, that the purpose of requiring the Underwriters' label is to show that it was manufactured according to certain standards so that an analysis of each lot of hose is unnecessary and to insure uniformity in bids (Tr. 12, 19). The brochure referred to by the trial court is entitled, "Standard for Cotton Rubber-Lined Fire Hose." The Underwriters' inspection had no reference to the contract of sale and the certification that the hose was manufactured according to certain standard did not constitute an acceptance by the City of Seattle.

A similar case is *Smith v. Great Atlantic & Pacific Tea Co.*, 170 F. 2d 474. A quantity of canned spinach was purchased from Smith under a contract specifying that Government grade certificates be attached to the invoices. The goods were shipped with a United States Department of Agriculture certificate attached to the bill of lading certifying the grade to be U. S. Grade C

or U. S. Standard. The purchaser paid the invoice and distributed part of the goods to its customers. It was subsequently discovered that the spinach was not of merchantable quality because it contained plant lice or aphis. The seller claimed that there was no implied warranty because of the Government inspection and certification. It was held that the Government inspector was not the agent of the buyer in making the inspection; that the buyer did not know what inspection had been made and even if the inspector could be considered the agent of the buyer, it would not defeat the implied warranty unless it could be shown that the inspection should have revealed the defect in the goods.

An implied warranty applies even where the buyer inspects the goods before acceptance unless the defects were such as should have been revealed by such inspection. In *Barrett v. Panther Rubber Mfg. Co.*, 24 F. 2d 329, the rubber company was the manufacturer of rubber heels and purchased from Barrett Co. a large quantity of an oil product to be used for softening scrap rubber used in the heels. Barrett Co. knew the purpose for which the oil was to be used and before the purchase was made furnished the rubber company with some of the oil for trial and the heels manufactured with its use appeared to be satisfactory. A large quantity was then purchased and heels manufactured with its use were distributed to jobbers. Several months later a green bloom appeared on these heels which made them unmerchantable. It was held that there was a latent defect in the oil product which made it unfit for its intended use and this defect could not be ascertained from

the buyer's inspection and since the seller knew the purpose for which the oil was to be used, there was an implied warranty that it would be suitable for that use.

In *Willig v. Brethauer* (Cal.), 274 P. 2d 202, the defendant was engaged in the business of raising pure bred hereford cattle and in furnishing herd sires. Plaintiff and his ranch manager visited defendant's ranch and inspected a number of sires and selected one for which plaintiff paid defendant a substantial price. It subsequently developed that the animal purchased was physically unfit for breeding purposes. It was claimed that there was no implied warranty because the buyer had made his own inspection before purchase. Held that the buyer's inspection did not defeat the implied warranty as the defect was not of a nature that would have been revealed by the inspection.

The trial court found that the hose was fit for its intended use when delivered to the fire department at Seattle. The court in its decision says:

"Defendant's own proof shows that immediately following arrival at Seattle the hose was examined by the purchaser and no visible effect or damage found therein. The scuffings and abrasions later found on the hose and couplings occurred during the period the hose was in the possession the Seattle Fire Department. Admittedly the hose was handled by Seattle firemen in the stations, on the engines and in a drying tower. It seems incredible to me that damage of the type and extent shown in the photographs and described in the evidence could have been caused in any other manner than by rough handling and/or improper storage during the period the hose was in Seattle when at all times it

was in the possession of the Seattle Fire Department." (Tr. 24-25)

The hose was apparently free from defects when it was delivered to the fire department (Tr. 12); when it was returned to appellee's factory it was unfit for use as fire hose (Tr. 14, 21). From these facts alone, it might properly be inferred that the hose was damaged while in the possession of the fire department. However, an inference has no evidentiary force against positive testimony to the contrary. The court infers from the appearance of the hose after its return that it was damaged by the fire department. There is direct evidence that defects appeared in 37 sections within a few days after delivery; that this hose had never been put in use and was only handled in stenciling, hanging up to dry and put on the fire apparatus (Tr. 15-16); that these sections were examined and tested by a representative of the fire department and a representative of the Underwriters' Laboratories and there were unable to determine the cause of the breaks in the outer jackets (Tr. 13).

"Inferences or presumptions speak in the absence of evidence but cannot be weighed in the balance against evidence."

Guaranty Trust Co. v. Minneapolis St. P. R. Co.,  
36 F. 2d 747.

An inference or presumption has no evidentiary force against positive evidence to the contrary."

Arasi v. Orient Ins. Co., 50 F. 2d 548.

"A presumption cannot be weighed as against evidence, and does not constitute affirmative proof. It takes the place of evidence; but when there is

evidence upon an issue presumption as to that issue disappears."

Miller v. Union Pacific Co., 63 F 2d 574.

The defects in this hose consisted of the failure of the fabric of the outer jacket to stand up. Two lots of hose were purchased by the city at the same time and no defects were found except in this particular lot (Tr. 18). When the hose was inspected by the Underwriters before shipment, one section was rejected for defects in the jacket (Tr. 21). Within a few days after delivery defects appeared in 37 sections delivered to one engine company before the hose was put in use (Tr. 15). Within a few months defects appeared in 22 additional sections delivered to another engine company (Tr. 14) and when the hose was returned to appellee all but 12 of the 96 sections were defective (Tr. 21). All of the defects consisted of breaks in the fabric of the outer jackets. Appellee was notified of the nature of the defects on May 28, 1952 (Tr. 16). The hose was inspected upon its return at appellee's factory between February 11 and 16, 1953, but no tests were made of the fabric in the jackets (Tr. 21), but the appellee's claims manager concluded that if the damage had been due to defects in the jackets the breaks would have been clean but instead the damage consisted of tears in individual strands indicated that it was only from wear as a result of the hose rubbing against another object (Tr. 21). The Underwriters' representative at appellee's factory says that it was apparent that the damage was caused by external action (Tr. 22). Assuming that the damage was only from wear and was caused by external

action does not support an inference that the hose was misused by the fire department. Good fire hose should last from 10 to 15 years according to the fire department (Tr. 14) and should last the average city several years according to appellee (Tr. 21) and it is a matter of common knowledge that fire hose does receive wear and does come in contact with other objects and when hose which should last for several years develops defects which make it unfit for use in less than a year and there is no evidence that it received any unusual treatment or use but there is evidence that it was handled in the usual manner, a finding that it was suitable for the use for which intended when received and a conclusion that there was no implied warranty of fitness is not supported by the facts or the law.

## II.

### **THE TRIAL COURT ERRED IN HOLDING THAT APPELLEE DID NOT ACCEPT A RESCISSION OF THE PURCHASE CONTRACT**

#### **POINTS AND AUTHORITIES**

The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after a lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

Sec. 75.480 Oregon Revised Statutes.

The rule requiring a person who has an election to rescind to act promptly is equally applicable to a party to whom rescission is tendered and who is thus given an election to accept or refuse it.

17 C.J.S. p. 919.

A mutual rescission may be established by conduct as well as by explicit agreement and where a vendee declares an intention to rescind, it is incumbent upon the vendor to either affirm or disaffirm the contract, and where the vendor thereafter accepts a return of the property and exercises any dominion over it, it amounts to a concurrence in the rescission.

Gray v. Mitchell, 145 Or. 519.

## ARGUMENT

We find no exceptions to the principles announced in the authorities quoted. The trial court concludes that the appellant was not entitled to rescind the purchase contract (Tr. 29). Whether or not the appellant was entitled to rescind is immaterial if it offered to rescind and the rescission was accepted by the appellee, as a matter of law, the contract was terminated. The trial court finds that the appellant returned the hose and the appellee accepted and retained the same for inspection and examination only (Tr. 28). This finding is not supported by any evidence in the record.

Appellant's president says that in a telephone conference with appellee's sales manager on December 18, 1952, he told the sales manager that appellant would

either have to have a replacement of the hose or a refund of the purchase price (Tr. 18). On January 16, 1953, appellant's manager notified the sales manager that appellant had no alternative but to return the hose and that it was being shipped back, collect (Tr. 17). Appellee's sales manager admits that appellant demanded a replacement of the hose but says that appellant was told that this could not be done until the factory had a chance to examine the hose and see whether it was defective or had been damaged by the customer and that the usual procedure was to ship the hose to the factory collect, for examination (Tr. 17-18). The hose was returned and accepted by the appellee. If as claimed it was accepted only for examination, the appellee had a right to retain it for a reasonable time for that purpose, but it had no right to retain it for any purpose of its own or to keep both the hose and the purchase price.

The trial court's finding that the hose was retained for examination only is contrary to the evidence. The hose was received at appellee's factory on February 11, 1953, was inspected and a report made to the sales department on February 16, 1953. It was then inspected by a representative of the Underwriters on April 10, 1953 (Tr. 20-21). If received only for the purpose of inspection that purpose was accomplished on April 10, 1953, but it was retained at the factory until August, 1953, and then transferred to appellee's warehouse "where it is now located" (Tr. 21). After the inspection, the hose was retained at the factory wholly for a purpose of appellee—awaiting instructions from appellee's

sales department as to its disposition (Tr. 21). No notice was ever given appellant that appellee refused to accept return of the hose; no offer was ever made to return it to appellant; no notice was given that it was being held awaiting appellant's order. Appellant never knew where the hose was or what was done with it until revealed by the testimony in the trial court (Tr. 18).

## CONCLUSION

When an article is purchased for a particular use which normally would be suitable for that use for a period of several years and becomes totally unfit for that use in less than a year, either there was a defect in the article itself or it was used for some purpose for which it was not intended. There is evidence in this case as to the use of the hose while in possession of the Seattle fire department. There is no evidence that there was any use out of the ordinary but the trial court infers from the appearance of the hose after its return that it was misused and this inference is all that supports the trial court's conclusion that the hose was free from defects when delivered and that there was no breach of the implied warranty of fitness.

Regardless of whether or not the purchaser had a right to rescind the contract of purchase, it tendered a rescission and returned the hose to the seller. The seller had the option to affirm or disaffirm the rescission by refusing to accept the return, by holding it subject to the purchaser's order or by storing it in the purchaser's

name, but it did none of these things. It retained both the hose and the purchase price and never recognized the purchaser's claim to either. There is no rule of law or equity to sustain the trial court's conclusion that the appellant is not entitled to a return of the purchase price.

The judgment of the trial court should be reversed and judgment for appellant as prayed for in its answer should be entered herein.

Respectfully submitted,

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Attorneys for Appellant.